No. 9826

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

GIN SOON GING,

On *Habeas Corpus*.

BRIEF OF APPELLEE.

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GIN SOON GING,

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BRIEF OF APPELLEE.

Statement of the Case.

This is an appeal taken from an order of the District Court denying appellant's petition for a Writ of Habeas Corpus. [Tr. p. 13.] By stipulation and order [Tr. p. 18], certain original immigration and naturalization records have been filed with the clerk of this Court. These files comprise the entire record upon which the administrative finding and order under attack herein was made. Wherever the occasion arises these records will be referred to by their file numbers appearing on the jacket in the righthand corner, excepting the certified Department of Justice file No. 56040/574, which will be referred to as the "Immigration Record". This latter file contains a complete transcript of the hearing accorded Gin Soon Ging by the Board of Special Inquiry.

The appellant, Gin Soon Ging, hereinafter called the "applicant", was born in China and is of the Chinese race. He has never been in the United States. On June 30, 1940, he arrived at San Pedro, California, from China on the SS "President Cleveland" and sought admission to the United States as the foreign-born son of Gin Ting. The United States citizenship of Gin Ting is conceded by the immigration authorities and is not at issue here. The applicant's case was heard by a Board of Special Inquiry appointed under Section 17 of the Immigration Act of February 5, 1917 (8 U. S. C. A. 153). After hearing the testimony offered by the applicant and his witnesses, the Board of Special Inquiry determined the applicant had not established his claimed citizenship status and therefore unanimously voted to exclude him from the United States. From this decision the applicant appealed to the Attorney General. After a hearing by the Board of Immigration Appeals at Washington, D. C., the decision of the Board of Special Inquiry was affirmed and the appeal dismissed. Thereupon the applicant petitioned for a writ of habeas corpus. From an order denying the writ the applicant has appealed to this Court.

The Issue.

This case presents but one issue:

WAS THE APPLICANT ACCORDED A FAIR HEARING?

> "* * * If it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed conclusive and is not subject to review by the court."
>
> *Tang Tun v. Edsell,* 223 U. S. 673, 675.

ARGUMENT.

The rules of law applicable to this case have long been clearly defined. In the case of:

> *Jung Sam v. Haff* (C. C. A. 9, decided December 18, 1940), 116 Fed. (2d) 384,

at page 387, the Court, speaking through Judge Garrecht, stated the principles controlling a review of these proceedings as follows:

> "It is established by a large number of decisions that 'the findings of the immigration officers on questions of fact affecting the right of an alien to enter this country are conclusive against any inquiry by the courts.' Fong Quong Hay v. Nagle, 9 Cir., 17 F. 2d 231, 232. Just as firmly fixed is the rule, in cases of this character, that before this court on review can overturn the determination of immigration authorities it must appear that the evidence submitted on the application for admission so conclusively established the fact in issue that the order of exclusion must be held arbitrary or capricious. Mui Sam Hun v. United States, 9 Cir., 78 F. 2d 612, 615. Denial of fair hearing is not established merely by proving the decision of the immigration officers was wrong. United States *ex rel.* Tisi v. Tod, 264 U. S. 131, 133, 44 S. Ct. 260, 68 L. Ed. 590; Kishan Singh v. Carr, 9 Cir., 88 F. 2d 672, 679. It is of no consequence that this court may have found differently than the immigration officers upon the evidence adduced, for it is not our function to weigh the evidence, but to consider whether or not the applicant was accorded a fair hearing. Mui Sam Hun v. United States, *supra;* Ong Guey Foon v. Blee, 9 Cir., 112 F. 2d 678, 689; Dong Ah Lon v. Proctor, 9 Cir., 110 F. 2d 808, 809, 810."

The applicant seeking admission to the United States has the burden of submitting satisfactory proof of his citizenship.

United States ex rel. Polymeris v. Trudell, 284 U. S. 279;

Quon Quon Poy v. Johnson, 273 U. S. 352;

Mui Sam Hun v. United States (C. C. A. 9), 78 F. (2d) 612;

Won Ying Loon v. Carr (C. C. A. 9), 108 F. (2d) 91, 92.

The applicant in the case at bar has never resided in the United States. He was born in China and is of the Chinese race. Under the treaty, laws and rules governing the admission of Chinese (22 Stat. L. 826; 58, 115, 476, 477:—28 Stat. L. 7; 32 Stat. L. 176) he is inadmissible unless he can satisfactorily establish that he is a citizen of the United States. He claims he is the legitimate foreign-born son of Gin Ting and that therefore he is a citizen of the United States under Section 1993, Revised Statutes. On this question the applicant, who had the burden of proof, offered no evidence except the oral testimony of himself, his alleged father, Gin Ting, and an unrelated witness, Gin Wing Fun. No documentary evidence of any kind was produced or offered to support the claimed relationship between the applicant and Gin Ting.

It was the duty and function of the immigration authorities to determine if the claimed parent-son relationship actually existed. This question of fact was decided ad-

versely to the applicant by a tribunal authorized by law to consider and decide such a question. Commenting upon this function of the Board of Special Inquiry in the recent case of

> *Young Nguey Sek v. Carmichael* (C. C. A. 9, decided March 11, 1941), 118 F. (2d) 105,

Circuit Judge Denman said:

> "* * * The Board and the Secretary of Labor had to decide no more than that appellant had failed in his burden to show *affirmatively* the parent-son relationship." (Emphasis ours.)

After hearing and weighing the testimony the Board of Special Inquiry, composed of three members, decided the applicant had failed to show affirmatively the parent-son relationship.

This case is a matter of identification involving citizenship. The only evidence presented on this issue was the oral testimony of the interested parties themselves, namely, the applicant and his alleged father, Gin Ting. The testimony of the witness Gin Wing Fun is of no value on this point. He is not related to the applicant and has no personal knowledge of the relationship between the applicant and Gin Ting. He merely testified that he had seen the applicant twice in China, once in 1937 and again in 1938. [Immigration Record, Q. 100-103.] But even in this there is a conflict. Seattle file 7032/2754 shows that when this witness returned from a trip to China June 15, 1938, he was asked under oath if he had visited the home in China

of any resident of the United States or if he had been introduced to the son, wife, or daughter of any resident of this country while in China, and he replied in the negative. When confronted with this contradictory prior testimony the witness attempted to explain this by saying that the interpreter told him it was not necessary to mention what village and who he had visited in China. It was not incumbent upon the Board to accept this explanation and it did not do so.

The testimony of the applicant and that of his alleged father was to the effect that applicant was born in the Fung Wah Village, China, C. R., 15-4-14 (May 25, 1926). [Hearing p. 26 and Immigration Record, Q. 76.] Gin Ting further testified that he had three sons born in China as follows [Q. 76]:

> "1. Gin Hung Guon—age 30, born Jan. 30 or 31, 1912, in Fung Wah Village, China.
>
> 2. Gin Soon Gan (applicant), age 15, born June 24 or 25, 1926, in Fung Wah Village, China, and
>
> 3. Gin Son Pang, age 14, born May 4 or 5, 1927, in Fung Wah Village."

The applicant, likewise, states his alleged father has three sons, as follows [Q. 8]:

> "1. Gin Hing Goon; married marriage name Gin Man Toy, age 30; I never asked my mother when he was born, so I don't know; he was married in our village, C. R. 22-12-20 (Feb. 3, 1933) to Wong Shee of Ngor May Village, Hoy Shan. He was born in our village. He has tried to come to America twice and has been deported twice * * *.

2. Myself.

3. Gin Soon Pang, age 14, born C. R. 16-5-15 (June 14, 1927) at our village and is now home attending the Que Gee School located about one or two li to the South of our village."

It is with respect to the alleged brother-son, Gin Hung Goon, that the most serious discrepancy in the testimony of the applicant and his alleged father appears. File No. 37221/7-27 relates to this alleged brother-son. It shows he twice sought admission to the United States as the son of Gin Ting and was twice rejected. Each time the alleged father Gin Ting appeared and gave testimony. But there were so many discrepancies between his testimony and that of the applicant on family matters and on the question of the age of the applicant that the claim of relationship was rejected. The court's attention is invited to the summary of the Board of Special Inquiry appearing in file 37221/7-27 [pp. 40-45]. The record also shows that a review of that decision was sought in the courts through habeas corpus proceedings but the petition was denied.

The applicant in the instant case now testifies he is the blood brother of Gin Hung Quon, and in so testifying he makes some of the same mistakes his alleged father made regarding this same Chinese. The present applicant identifies a photograph of said Gin Hung Quon as his brother. [Q. 13 and 14.] He testified that said Gin Hung Quon has one son named Gin Thloon Jom, born C. R. 24-6-13 (July 15, 1935) in the Fung Wah Village and that Gin Hung Quon never had any other children. [Q. 10, 11.]

The alleged father, when testifying on behalf of said Gin Hung Quon at San Francisco on August 13, 1937, testified as follows [San Francisco file 37221/7-27, p. 27]:

"Q. How many of your sons have been married? A. My oldest son, Gin Hung Quon.

Q. When, where and to whom was he married? A. I do not know when he was married. He was married in Hong Kong to Wong Shee.

Q. Can you state during what year he was married? A. It was either C. R. 22 or 23 (1933 or 1934). I received a letter from him telling me about it.

Q. Did you keep the letter referred to? A. No, I tore it up.

Q. Has applicant's wife borne him a child or children? A. *He wrote to me in the second letter stating he had a daughter; that is all. It was about a year after he was married that he sent me this second letter.*

Q. Did applicant Gin Hung Quon inform you what the name of his daughter was? A. *Gin Joon Shem.*

Q. Do you know where the wife and daughter of applicant now reside? A. They are now living at the Fung Wah Village." (Emphasis ours.)

And in the same proceeding, Gin Hung Quon himself testified on August 13, 1937, as follows [San Francisco file 37221/7-27, p. 17]:

"Q. How many times have you been married? A. Once only.

Q. When, where, and to whom were you married? A. In C. R. 23-12-12, changes, 23-12-20 (Jan. 24, 1935) to Wong Shee in Fung Wah Village.

Q. Has your wife borne you a child or children? A. No.

Q. Is she an expectant mother? A. I don't know."

Thus we have Gin Hung Quon testifying in 1937 that he had no children, Gin Ting testifying in the same year that Gin Hung Quon had a daughter, Gin Joon Shem, and the applicant in the case at bar testifying that Gin Hung Quon has a son, Gin Thloon Jom, born July 15, 1935.

Speaking of such contradictions in the case of

Won Ying Loon v. Carr, supra,

Circuit Judge Mathews said:

"Whether in testifying as they did, appellant and Won Doo Mo (alleged father) were deliberately lying or were stating what they honestly believed to be true is, for present purposes, immaterial. Whatever their intentions or beliefs may have been, their testimony was partly, if not wholly, false. Knowing this, and not knowing which part, if any, of their testimony was true, the board was warranted in rejecting it all and holding that appellant's claim that he was Wong Ying Loon had not been established."

The Board of Special Inquiry unquestionably had a right to consider prior departmental records and to base its decision on the discrepancies developed through the use of such records:

Soo Hoo Yen v. Tillinghast (C. C. A. 1), 24 F. (2d) 163;

U. S. ex rel. Ng Kee Wong v. Corsi (C. C. A. 2), 65 F. (2d) 564;

Ex parte Wong Foo Gwong (C. C. A. 9), 50 F. (2d) 360;

Tang Tun v. Edsell, supra.

It is clear, therefore, that testimony of an alleged prior deported brother in conflict with the present applicant may properly be considered by the Board of Special Inquiry and form the basis of an excluding decision. And it has been held that where one applicant's claim is dubious, the claim of the others that he is their brother weakens their assertion:

> *Chung Fong Kwon et al. v. Tillinghast,* 33 F. (2d) 398 (affirmed 35 F. (2d) 1016).

But there is more than this fatal conflict in the testimony of the principal actors in the case at bar. In 1931 Gin Hong Quon, whom the applicant claims is his blood brother, testified that his father, Gin Ting, had been married twice and that he and all the other sons were issue of the second wife, Lee Shee. Both the present applicant and the alleged father have testified that the latter was married once.

Having in mind these contradictions in the testimony, it cannot be fairly said that the Board of Special Inquiry (the triers of the fact) acted capriciously in rejecting the claimed relationship. And, when considering further the fact that there has been no direct identification of the applicant as the son of Gin Ting, it cannot be fairly said that the applicant has sustained the burden of proof. Here the alleged father, Gin Ting, is in no position to identify the applicant as his son. He has not been in China since 1927 when the applicant was slightly over a year old. It is not unreasonable to refuse to accept his testimony under such circumstances. In the case of

Tillinghast v. Flynn ex rel. Chin King, 38 F. (2d) 5,

it was held that where the identifying witness had not seen the applicant since the latter was 5½ years old and the applicant was then 13 years, refusal to accept his testimony was not unreasonable.

Respondent submits that the administrative proceeding in the case at bar was fair in every respect and that there is ample justification for rejecting the applicant's claim.

Reply to Appellant's Brief.

Counsel complains that the Board was arbitrary in refusing to believe the testimony of the applicant because of the discrepancies developed and because the testimony of the applicant and his witnesses agreed in many details.

It is observed that counsel includes in his brief the statement of a certain Inspector Roy M. Porter, of Seattle (p. 15). This particular statement is not a citation from any case but a purported extract from a Department file, which presumably is a part of the Department records at Washington. It is not in evidence or alluded to by administrative officials in the case at bar. It is, of course, recognized that examination of arriving aliens vary in each particular case. This case is like many which involve the citizenship of Chinese applicants. The facts are wholly within the knowledge of interested witnesses, and fabrication can only be detected by the inconsistencies between their versions, or inherent contradictions, since the bare

narration is seldom antecedently improbable. The object of bringing out discrepancies is to impeach the witness or to give a ground for disbelieving him. There is no rule by which the seriousness of discrepancies can be measured. Each case depends upon its own facts.

> *White v. Chan Wy Sheung* (C. C. A. 9), 270 F. 764;
>
> *Tom Ung Chai v. Burnett* (C. C. A. 9), 25 F. (2d) 574;
>
> *Young Mew Song v. United States* (C. C. A. 9), 36 F. (2d) 563;
>
> *Chan Nom Gee v. United States* (C. C. A. 9), 57 F. (2d) 846.

In the case of

> *Hom Dong Wah v. Weedin,* 24 F. (2d) 774,

this court quoted with approval from the opinion in the case of *Sui Say v. Nagle,* 295 F. 676, as follows:

> "In cases of this character, experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship, cannot be safely accepted or relied upon. Resort is therefore had to collateral facts for corroboration, or the reverse. If the witnesses are in accord as to a number of collateral facts which they should know if the claimed relationship exists, and probably would not know if the claim of relationship did not exist, there is at least a reasonable probability that the testimony is true. If, on the other hand, the witnesses disagree as to the collateral facts which they should or would know if the claimed relationship exists, especially such an important fact as membership in the immediate family of the parties, there is a strong probability that the claimed relationship is false and fraudulent."

Although there are details upon which the testimony agrees, as contended by counsel, it is not possible to reconcile the discrepancies hereinabove commented upon. On this point in the case of

> *Weedin v. Yee Wing Soon* (C. C. A. 9), 48 F. (2d) 36,

Circuit Judge Wilbur said:

> "In the case at bar, we have a multitude of agreements upon a great variety of details in the testimony which are quite consistent with the claimed relationship and point with great emphasis to the truth of the claim. On the other hand, we have a discrepancy that is difficult if not impossible to reconcile with the alleged relationship. * * *"

And, in further comment on this aspect of the case, said:

> "* * * At the outset it must be conceded that there is a complete accord in the testimony upon such a multitude of details as would hardly be expected if the claim of relationship did not exist. Indeed, such a complete accord would hardly be anticipated if the relationship did exist unless there was some previous conference between the witnesses to refresh their memory upon the numerous details upon which they might reasonably expect to be examined."

Counsel also attempts to apply rules of evidence to the proceedings before the Board of Special Inquiry; however, it is not open to the courts to consider either the admissibility or the weight of proof according to the ordinary rules of evidence, and the fact that the rules of evi-

dence as applied in courts of law are violated does not show that the hearing was unfair.

> *Healey v. Backus,* 221 Fed. 358;
>
> *Frick v. Lewis,* 195 Fed. 693;
>
> *Lee Lung v. Patterson,* 186 U. S. 168, 176.

Appellee submits that the discrepancies developed in this case are sufficiently serious to preclude the determination that the applicant was not given a fair hearing or that the District Court erred in sustaining such finding. The record fully bears out District Judge Beaumont in his conclusion [Tr. p. 14] that:

> "After a study of the record herein the Court cannot say that the Board of Special Inquiry committed a manifest abuse of the power and discretion conferred upon it. In this case the evidence is such that reasonable men might differ as to its probative effect."

Conclusion.

For the reasons hereinabove stated, appellee respectfully submits that the lower court did not err in holding and finding that there was no manifest abuse of discretion by the immigration authorities, and that the administrative order was not a result of an arbitrary or unfair hearing. Wherefore, appellee prays that the decision of the lower court be affirmed and appeal dismissed.

Respectfully submitted,

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